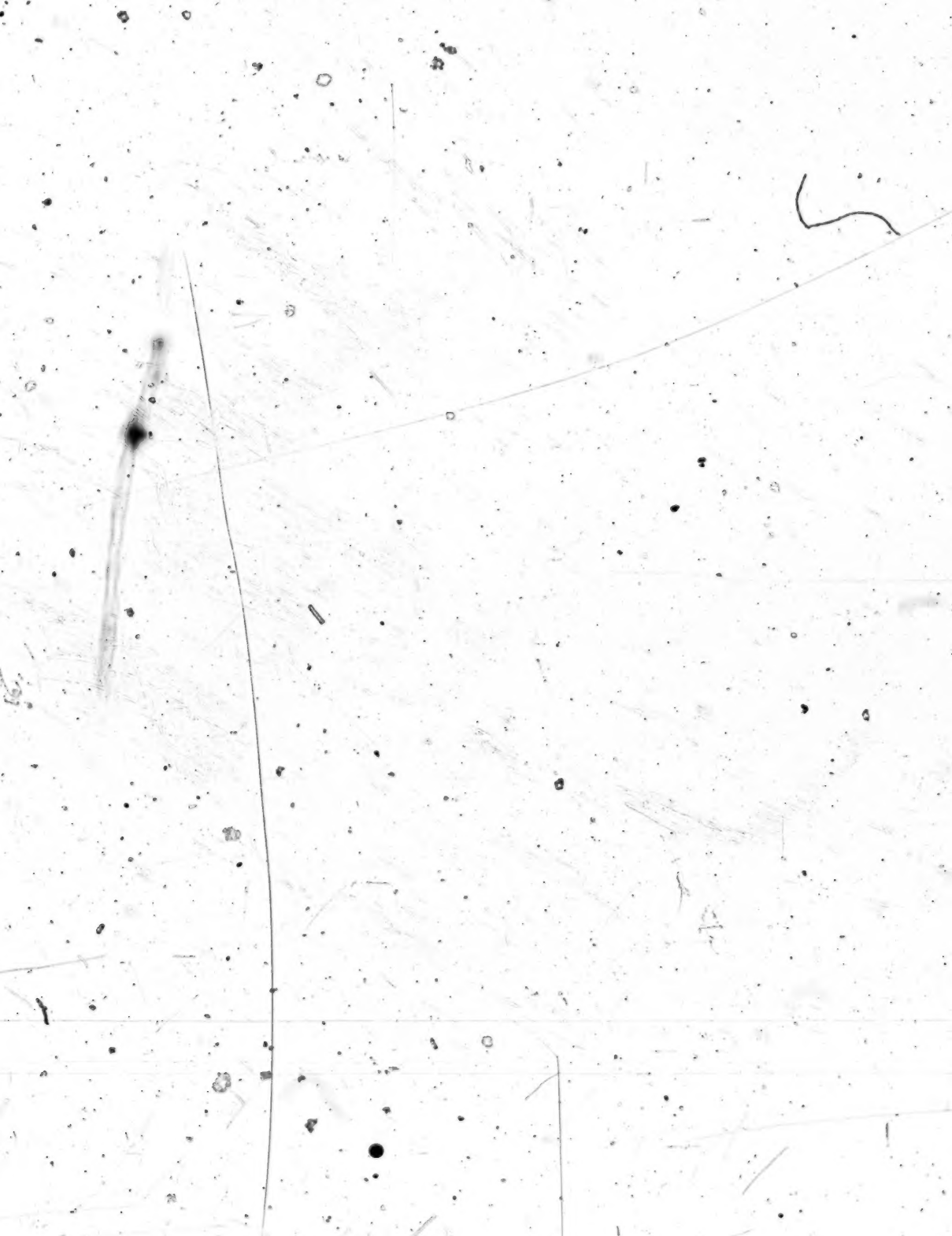

NO. 750

In the Supreme Court of the United States

October Term, 1938

OKLAHOMA PACKING COMPANY, formerly WILSON & CO., INC. OF OKLAHOMA, an Oklahoma Corporation, and WILSON & CO., INC. OF OKLAHOMA, a Delaware Corporation,

Petitioners,

VERSUS

OKLAHOMA GAS and ELECTRIC COMPANY, a Corporation; OKLAHOMA NATURAL GAS COMPANY, a Corporation; W. T. PHILLIPS, JR., H. J. CRAWFORD, J. V. RITTS, LEONARD C. RITTS, R. W. HANNAN, A. W. LEONARD, and R. C. SHARP, the Directors of the Oklahoma Natural Gas Company, a Dissolved Corporation; and OKLAHOMA NATURAL GAS CORPORATION,

Respondents.

RESPONSE TO BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. J. UNDERWOOD,
ROBERT M. RAINEY,
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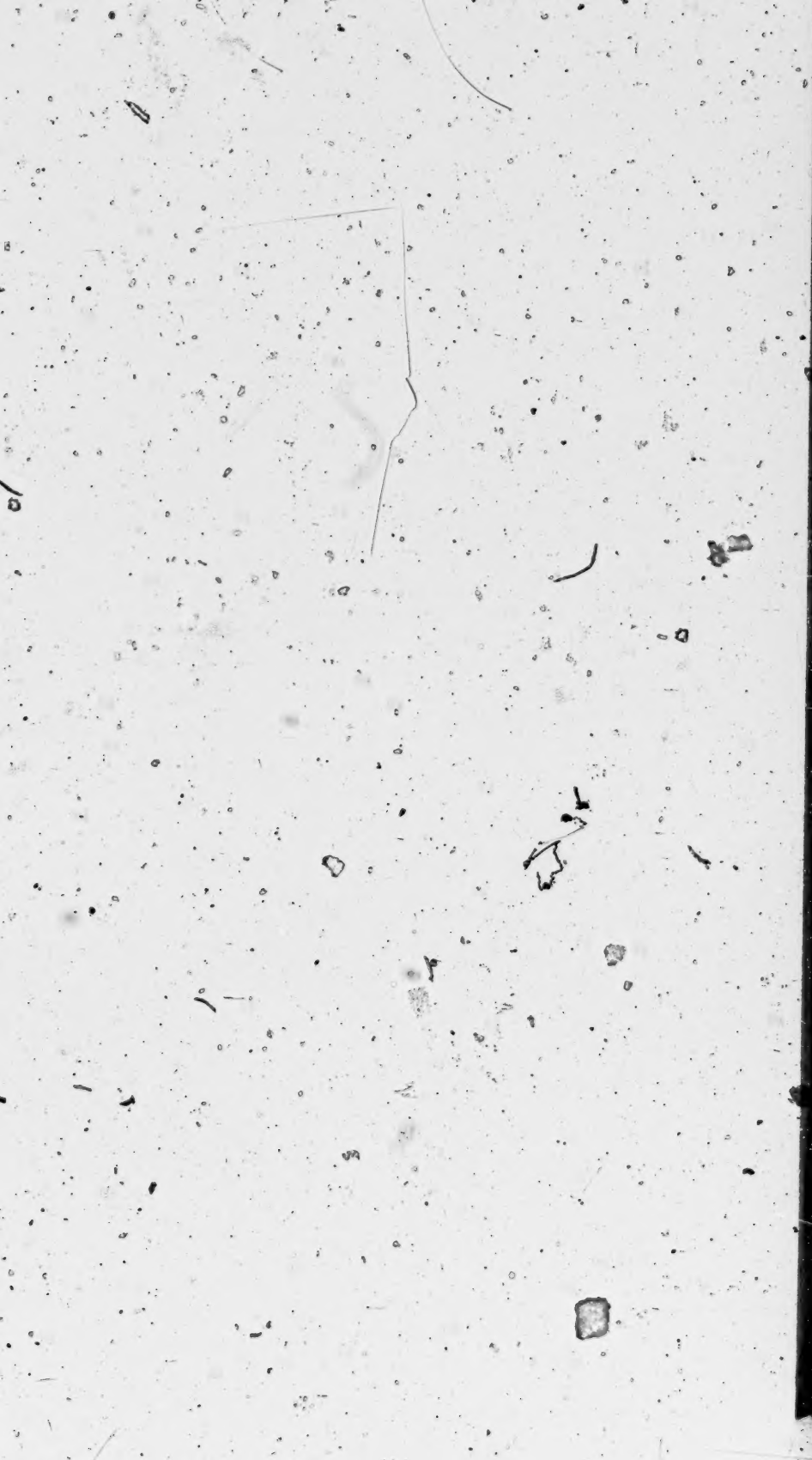
Attorneys for Respondents.



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The facts are fully set forth in the opinion of the Circuit Court of Appeals. Petitioners predicate their appeal for the writ on three grounds, none of which involves the merits of the case. We will respond to grounds urged in the order in which they appear in petitioners' brief.

I.

REPLY TO PETITIONERS' FIRST PROPOSITION

(Petitioners' Brief pp. 9-13.)

The order of the Corporation Commission complained of was entered on the 13th of April, 1926 (R. 16). An ap-

peal was prosecuted to the Supreme Court of the State, which affirmed the order of the Commission on the 29th day of April, 1930 (*Oklahoma Gas and Electric Co.* v. *Wilson & Co., Inc.*, 146 Okla. 272, 288 Pac. 316). It is contended by petitioners that the action of the Supreme Court in affirming the Commission's order was judicial and not legislative, and that if respondents were dissatisfied with the action of the Supreme Court of the State they should have prosecuted an appeal to this Court rather than filing a suit in equity in the United States District Court for the Western District of Oklahoma. In that suit the United States District Court sustained a motion to dismiss and respondents prosecuted an appeal to the Circuit Court of Appeals, which reversed the District Court (*Oklahoma Gas and Electric Co.* v. *Wilson & Co., Inc.*, 54 Fed. (2d) 596).

Petitioners urge that, since the Supreme Court of the State on October 17, 1935, in the case of *Oklahoma Cotton Ginners' Ass'n et al.* v. *State et al.*, 174 Okla. 243, 51 Pac. (2d) 327, held that it there acted judicially as distinguished from legislatively in reviewing appeals from a certain class of orders of the Corporation Commission, this Court should hold that the Supreme Court of the State acted judicially when it passed upon the appeal from the challenged order of the Corporation Commission in April, 1930. (146 Okla. 272, 288 Pac. 316.)

The Supreme Court of Oklahoma, until the decision in the Cotton Ginners' Ass'n case *supra*, had always considered all appeals from the Corporation Commission in a legislative

capacity. In the case of *McAlester Gas & Coke Co.* v. *Corporation Commission*, 101 Okla. 268, 224 Pac. 698, it specifically marked out and approved the very procedure followed in this case to obtain a judicial review of the challenged order. In the case of *City of Poteau* v. *American Indian Oil & Gas Co.*, 159 Okla. 240, 18 Pac. (2d) 523, the Supreme Court of the State cites with approval the case of *Oklahoma Gas & Electric Co.* v. *Wilson & Co., Inc.*, 54 Fed. (2d) 596, and states that the court therein held that the action of the Supreme Court of the State in *Oklahoma Gas & Electric Co.* v. *Wilson & Co.*, 146 Okla. 272, 288 Pac. 316, was legislative and not judicial.

The Supreme Court of the State, in *Oklahoma Gas & Electric Co.* v. *Wilson & Co., Inc.*, 178 Okla. 604, 63 Pac. (2d) 703, in staying an action instituted by petitioner in the District Court in and for Oklahoma County, pending the disposition of this case, specifically held that respondents, by their suit in equity, were pursuing the only certain method of obtaining a judicial determination of the validity of the order here under attack. It would not, we suggest, have stayed further proceedings had it been of the opinion that its review of the order challenged herein was judicial and not legislative. The fact that the Supreme Court of the State, in the Cotton Ginners' case several years after the time to appeal to this Court had expired, receded from its prior rulings, cannot affect this case. The situation is very similar to that before this Court in the case of *Corporation Commission of Oklahoma et al.* v. *Carey, Trustee*, 296 U. S. 452.

II.

REPLY TO PETITIONERS' SECOND PROPOSITION

(Petitioners' Brief pp. 13-15.)

Petitioners fail to see any distinction between enjoining proceedings in the State Court and enjoining the parties in an action in a State Court, and emphasize the fact that the case of *Steelman* v. *All Continent Co.*, 301 U. S. 278, is a bankruptcy case. The cases cited therein are not bankruptcy cases, and several deal with Sec. 265 of the Judicial Code. In *Smith* v. *Apple*, 264 U. S. 274, one of the cases cited, it was specifically held that Section 265 does not deprive a district court of jurisdiction otherwise conferred by the Federal Statutes, but merely goes to the question of equity in the particular bill. See also *Woodmen of the World* v. *O'Neill*, 266 U. S. 292. Petitioners do not at this time question the equity of respondents' bill, and it conclusively appears under the decisions of both the state and federal courts that the action instituted by petitioners in the District Court of Oklahoma County would only have the effect of harassing respondents and uselessly causing them expense and annoyance since the District Court of Oklahoma County cannot render a judgment against them prior to the determination of the equity suit. *Oklahoma Gas & Electric Co.* v. *Wilson & Co., Inc.*, 178 Okla. 604, 63 Pac. (2d) 703-705. This case in principle is the same as that of *Marshall* v. *Holmes*, 141 U. S. 589, and *Wells Fargo & Co.* v. *Taylor*, 254 U. S. 175, wherein it was held that a Federal Court of Equity could enjoin the enforcement of judgments wrongfully obtained in a state court.

III.

REPLY TO PETITIONERS' THIRD PROPOSITION

(Petitioners' Brief pp. 15-16.)

The question of venue is so fully discussed in the Circuit Court of Appeals' opinion that there is little we might attempt to add. Petitioners were doing business in the state long prior to the filing of this suit (R. 41), and will be held to have consented to be sued in Oklahoma or will be estopped to urge that such consent was not given. *Smolik v. Philadelphia & Redding Coal & Iron Co.*, 222 Fed. 148. The return of the marshal, which was never subject to attack, shows that process was served on W. W. Martin, service agent for said corporation (R. 37). In addition, the lower court which entered findings of fact (para. 10, R. 96) found petitioners were doing business in Oklahoma prior to the institution of this suit, and that, as provided by the statutes of the state, it "duly executed in writing and filed with the proper officers of the State of Oklahoma an appointment of an agent upon whom service of process might be had in any action in the State of Oklahoma to which said company may be a party, and consenting that such service would be due and legal service on the company and that all actions against it might be brought in the county in which the cause of action arose." As the Circuit Court of Appeals points out, this finding of fact was never excepted to or otherwise challenged below.

The only case cited by petitioners is that of *Southern Pacific Co. v. Denton*, 146 U. S. 202. It will be observed in that case that the plaintiff relied on two statutes of Texas to

hold the defendant in court. Both statutes are discussed in the opinion. This Court first took up the statute dealing with the entrance requirements for a foreign corporation desiring to transact business in the state. One of those requirements was that process could be served on certain agents. Another was that the corporation would not remove cases to the federal court. This Court held that the statute requiring the corporation to surrender the right of removal secured by the laws of the United States was void, citing *Insurance Co.* v. *Morse*, 20 Wallace 445, and *Barron* v. *Burnside*, 121 U. S. 186. Both of those cases dealt with statutes providing that foreign corporations, as a condition of entrance, should agree not to remove cases to the federal court. It is clear in the Denton case that the right which Texas required to be surrendered and which rendered the entire statute void, was the *right of removal.* The reason given why a state could not require a foreign corporation to forego the right to remove cases to the federal courts was that parties by agreement cannot deprive a court of jurisdiction and, under the Constitution and laws of the United States the federal courts have jurisdiction where diversity of citizenship of the parties exists.

The case of *Barron* v. *Burnside*, 121 U. S. 186, based upon the case of *Insurance Co.* v. *Morse*, 20 Wallace 445, does much to explain the holding in the Denton case. The Iowa statute involved in the Barron case was very similar to the Texas statute in the Denton case, in that it provided for service of process on an agent, and required an agreement against removal. This court struck down the entire

statute, just as it did in the Denton case, holding that the service provision and the provision against removals were not separable. As to the service provision, if standing alone, this Court said:

> "An affirmative provision requiring the filing * * * with the Secretary of State * *,* of an authority for the service of process upon a designated officer or agent in the state might not be an unreasonable or objectionable requirement if standing alone * * *."

This Court in the Denton case, just as it did in the case of Barron v. Burnside, after holding the entire statute void, discusses the section dealing with the service of process just as if it had stood alone, and holds that prior to the amendment of the venue statute the mere appointment of an agent for the service of process was a consent to be found within the state, but that after the amendment such an appointment of an agent alone was not broad enough to constitute a waiver of venue. The Oklahoma constitutional and statutory entrance requirements are much broader than the statutes providing for the appointment of an agent for service. They are set out in the opinion of the Circuit Court of Appeals and exact not merely a consent to be *served* but a consent to be *sued*.

This Court in the Denton case next considered the Texas practice statute, which provided that a special appearance should constitute a general appearance. There can be no confusion in regard to the holding of this Court if it is kept in mind in considering the latter portion of the opinion that the court was discussing the practice

statute of the state and not the entrance requirement statute.

It is respectfully submitted that the prayed for writ should be denied.

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